IN THE MATTER OF S——

In DEPORTATION Proceedings

56050/970

Decided by the Board November 13, 1943

Approved by the Attorney General November 19, 1943

Suspension of deportation—Validity of marriage.

When an alien applied for suspension of deportation under section 19 (c) of the Immigration Act of 1917, as amended, and his eligibility therefor depended upon the validity of his marriage; *held*, a ceremonial marriage is presumed valid as against an alleged prior common-law marriage arising from a relationship admittedly illicit at its inception and not supported by a bona-fide agreement of marriage or other manifestations of an existing common-law marriage.

CHARGES:

Warrant: Act of 1924—Remained longer than permitted.
Lodged: Act of 1924—Immigrant without immigration visa.

Mr. Jacob W. Rozinsky, New York City, for the respondent.
Mrs. Mary P. Clark, Board attorney-examiner.

BEFORE THE BOARD

The respondent is a native of Wales, subject of Great Britain, 44 years of age, whose only entry into the United States occurred on September 28, 1926, at the port of Baltimore, Md., when he arrived as a member of the crew of the S. S. *Olio* and deserted. He testified that when he signed on this vessel at Swansea, Wales, knowing that it was destined for the United States, it was his intention to desert when he arrived at a port in this country. The respondent further testified that he has never applied for or received an immigration visa from an American consul abroad, nor has he ever been admitted to the United States for permanent residence.

FINDINGS OF FACT: Upon the basis of the evidence, it is found:

(1) That the respondent is an alien, a native of Wales, subject of Great Britain;

(2) That the respondent last entered the United States on September 28, 1926, at the port of Baltimore, Md., as a member of the crew of the S. S. *Olio* and deserted;

(3) That the respondent entered the United States for permanent residence;

(4) That at the time of his entry the respondent was not in possession of an immigration visa;

(5) That the respondent has never been admitted to the United States for permanent residence.

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CONCLUSIONS OF LAW: From the foregoing findings of fact, it is concluded:

(1) That under sections 13 and 14 of the Immigration Act of May 26, 1924, the respondent is subject to deportation on the ground that at the time of his entry he was not in possession of an unexpired immigration visa;

(2) That under sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is not subject to deportation on the ground that he has remained in the United States longer than permitted by that act and regulations made thereunder;

(3) That under section 20 of the Immigration Act of 1917 the respondent is deportable to Wales at Government expense.

SUSPENSION OF DEPORTATION——FACTORS: The respondent has filed forms I-55 and I-255, requesting suspension of deportation or, as an alternative, voluntary departure and preexamination. The presiding inspector, with the concurrence of the district director, finding that the respondent's marriage is not valid, recommends that he be permitted to depart from the United States in lieu of deportation, but the Central Office recommends suspension of deportation. The attorney for the alien filed a brief of exceptions to the presiding inspector's proposed findings and conclusions concerning the relief issue and appeared before this Board in oral argument on October 13, 1943, to urge that suspension of deportation be granted in this case.

The record establishes that on July 3, 1940, the alien married a subject of Great Britain who, at the time of the original hearing in these proceedings, was an applicant for United States citizenship. One child was born in the United States of this marriage, but died at the age of 7 months. The subject's wife testified that she is the mother of two children born in New York City in 1923 and 1928, respectively, of a relationship with one F—— D——, but that no marriage ceremony was ever entered into by them. She admitted that there was talk of marriage and that during the period of their cohabitation and up to the time of her marriage to the subject, she used the name of "Mrs. D——," but that after 8 years of this relationship she was convinced that the father of her children had no intention of marrying her and so suggested that they "call off the whole thing," which they did by mutual consent. This occurred in 1928, since which time the alien's wife has never seen F—— D——, nor has he at any time since 1928 contributed to her or their children's support.

Based on these facts, the presiding inspector finds that a common-law marriage existed between the parties, and that, since the alien's wife testified that she took no legal steps to terminate this relationship and no proof of the decease of F—— D—— was offered in evidence, the marriage with the respondent in 1940 cannot be considered valid.

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Attorney for the alien contends that no common-law marriage relationship existed between his client's wife and F—— D——, and this Board concurs in this contention.

The presumption in favor of the legality of a marriage is one of the strongest known to the law (*Smith* v. *Smith*, 185 N. Y. S. 558), and the presumption of the validity of a subsequent marriage will prevail over the presumption of the existence of a former marriage arising out of cohabitation and reputation (*In re Eichler et al.*, 146 N. Y. S. 846, 851; *In re Farley's Estate*, 155 N. Y. S. 63). Although it has been held appropriate to indulge in every presumption in favor of the legality of a common-law marriage in the same way and to the same extent as the law indulges in favor of a ceremonial marriage (*Howard* v. *Kelly*, 71 So. 391), a relationship illicit in its inception is presumed to continue to be of that character unless repelled by a contrary presumption of marriage (*Moller* v. *Sommer*, 149 N. Y. S. 103). The respondent's wife testified that she began "keeping company" with F—— D—— in Syracuse, N. Y., and "had relations with him," but that, when she found out that she was pregnant, she moved to New York City where he visited her intermittently. It may be concluded from this testimony that their relationship was originally clandestine and illicit and, unless it is clearly established that they subsequently entered into an agreement of marriage supported by other manifestations essential to the finding of a valid common-law marriage, that their relation continued to be of this character. The presumption that ordinarily attaches to the first marriage is transferred to the second and stronger proof of the validity of the first marriage is required than if the second did not exist (*Lazarowicz* v. *Lazarowicz*, 154 N. Y. S. 107; *Johannessen* v. *Johannessen*, 128 N. Y. S. 892).

Such proof does not exist in the subject case. As indicated by the alien's attorney, "an actual and mutual agreement to enter into a matrimonial relationship, permanently and exclusive to all others, between parties capable in law of making such a contract" is essential to a valid common-law marriage (38 C. J. 89). Words evidencing only the intention to be married in future are ineffectual even where followed by cohabitation (*In re Farley's Estate*, *supra*). There is no showing in the record that the respondent's wife and her paramour considered themselves husband and wife; in fact, her testimony concerning their intention to get married would indicate, aside from her direct testimony, "I never considered myself married to him in that respect, although I took his name for the sake of the children," that neither of them considered themselves bound to each other as man and wife, legally or morally. Her statement that she considered herself the common-law wife of F—— D—— from 1920 to 1928 is contradicted by her testimony quoted above, and it is considered evident

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that, if there had been a common-law marriage between the parties, they would not have considered it necessary for her to change her place of abode when it was learned that she was to give birth to a child. Neither is F—— D——'s acknowledgment of the paternity of the children born of their relationship conclusive that he considered the alien's wife his common-law spouse in view of the other factors tending to prove otherwise. Accordingly, the respondent's marriage in 1940 will be deemed valid in the absence of sufficient evidence to establish the existence of a subsisting common-law marriage between his wife and F—— D——.

The alien testified that he earns approximately $30 a week, and that he is the main support of his wife and her two minor children. The alien's wife testified that, although she earns $16.50, she would be unable to support herself only through her own earning ability. Assets aggregating $2,000, including $1,000 in the bank, are claimed by the subject. It is considered evident that his deportation would result in serious economic detriment to his legally resident alien wife.

The Federal Bureau of Investigation has a record against the alien of one arrest for vagrancy in 1931, and the respondent testified that in 1921 he was arrested in Cardiff, Wales, on a charge of disorderly conduct and fined £1. An independent investigation conducted by the Immigration and Naturalization Service satisfactorily establishes that the alien bears a good reputation in the community in which he resides, which is further supported by the testimony of two naturalized citizens of the United States who have known the alien in excess of 5 years. It is concluded, therefore, that the subject has been a person of good moral character for the preceding 5 years.

After full inquiry no facts have been ascertained that would indicate that the alien is subject to deportation on any of the grounds set forth in section 19 (d) of the Immigration Act of 1917, as amended, nor is he racially inadmissible to citizenship.

SUSPENSION OF DEPORTATION—FINDINGS OF FACT: Upon the basis of the evidence, it is found:

(1) That the respondent is of the white race;
(2) That the respondent has been a person of good moral character for the preceding 5 years;
(3) That the deportation of the respondent would result in serious economic detriment to his legally resident alien wife;
(4) That the record fails to establish that the respondent is deportable under any of the provisions specified in section 19 (d) of the Immigration Act of February 5, 1917, as amended.

SUSPENSION OF DEPORTATION—CONCLUSION OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

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That the respondent is eligible for suspension of deportation under the provisions of section 19 (c) (2) of the Immigration Act of February 5, 1917, as amended.

ORDER: It is ordered that the deportation of the alien be suspended under the provision of section 19 (c) (2) of the Immigration Act of 1917, as amended.

As the case involves suspension of deportation of an alien pursuant to the provisions of section 19 (c) (2) of the Immigration Act of 1917, as amended, in accordance with the provisions of title 8, section 90.12, Code of Federal Regulations, this Board refers the case to the Attorney General for review of its decision.

BEFORE THE ATTORNEY GENERAL

The foregoing decision and order of the Board were certified to and approved by the Attorney General.

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